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No. 85-454

in the Supreme Court of the United States

OCTOBER TERM, 1985

SAUL MUNOZ SIBAJA and
RAFAELA ARRIETA PORRAS, ET AL
Petitioners,

vs.

DOW CHEMICAL COMPANY and
SHELL OIL COMPANY
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT SHELL OIL COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Respondent Shell Oil Company disagrees with the Petitioners' statement of the question presented for review. There may some day be a case which presents in a factually ripe posture the issue suggested by Petitioners. It may even arise in Florida. This is not that case, however, because regardless of whether the district court applied state or federal principals of *forum non conveniens*, the result in this instance would be the same.

There is no *Erie*[1] issue. As was true in *Piper AirCraft Co. v. Reyno*, 454 U.S. 235 (1981) and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), "the result of [Florida] standards that guide discretion is, so far as here involved, the same as the federal rule." *Gulf Oil, supra* at 509. Furthermore, if in fact this is an issue which could only arise in Florida, and is therefore Florida-peculiar, as Petitioners suggest, it must surely be questioned whether even a case presenting the issue in a proper factual posture would raise itself to one presenting "an important question of federal law" which "should be" settled by this Court. Sup.Ct.R. 17.

Consequently, the sole and only question which could here be presented for review is whether the court below abused its discretion in affirming the dismissal upon the doctrine of *forum non conveniens* of this transitory action which arose in Costa Rica and was brought by Costa Rican citizens and residents. And, that question presents neither an important question

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[1]*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

of undecided federal law nor one in conflict with any applicable decision of this Court. Neither does this case call for any exercise of this Court's supervisory powers.

PARTIES

No party to this action is a citizen of Florida. Respondents are Shell Oil Company and Dow Chemical Company, both incorporated in the State of Delaware. Dow Chemical Company has its principal place of business in the State of Michigan; Shell Oil Company has its principal place of business in the State of Texas. Neither Respondent corporation has a principal place of business in the State of Florida, and neither is a Florida corporation.

Petitioners are 58 Costa Rican citizens, all of whom reside in Costa Rica, where the alleged injuries occurred; their names have all been listed in Petitioners' Petition for Writ of Certiorari at pp. ii-iii, and are not herein repeated. However, pursuant to Rule 28(1), Shell Oil Company lists below all its United States affiliated companies and subsidiaries, which are not wholly owned, as defined in said Rule.[2]

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[2]Quazite Corporation (Houston, Texas), First Harlem Securities Corp. (New York, New York), Gravcap, Inc. (Schaumburg, Illinois), Heat Transfer Research, Inc. (S. Pasadena, California), Huntsman Chemical Co. (Salt Lake City, Utah), Inland Corp. (Cleveland, Ohio), LOOP, Inc. (New Orleans, Louisiana), Lucky Chance Mining Co., Inc. (Reno, Nevada), MESBIC Financial Corp. of Houston (Houston, Texas), and Seadock, Inc. (Freeport, Texas).

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JURISDICTION

Jurisdiction is sought to be invoked pursuant to 28 U.S.C. §1254(1). Petitioners assert that this Court should exercise its judicial discretion because the Federal Court of Appeals of the Eleventh Circuit has allegedly decided an important question of federal law. Sup.Ct. Rule 17(1)(c). Respondent Shell Oil Company disagrees. There is here presented neither an "important question of federal law" nor a previously unsettled issue. Neither the trial Court nor the Eleventh Circuit abused its discretion—the same discretion accorded Florida Courts with respect to *forum non conveniens*. The decision below is reported at 757 F.2d 1215 (11th Cir. 1985) and is set out in Petitioners' Appendix, as is the unreported decision of the trial Court.

STATUTE INVOLVED

The Rules of Decision Act, 28 U.S.C. §1652 may impliedly be involved in this purported *Erie* case, but it was neither specifically argued nor construed below. This case involves common-law principles of venue and Court management.

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RESPONDENT SHELL OIL COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners are fifty-eight Costa Rican citizens, who reside and work in Costa Rica. They claim they were injured in Costa Rica by exposure to pesticides manufactured by Respondents Shell Oil Company and/or Dow Chemical Company. Neither Respondent is a Florida corporation and neither has its principal place of business in Florida.[3] Nonetheless Petitioners brought suit through their Texas counsel in Miami, Florida. The action was removed to the Federal Court for the Southern District of Florida.

The Florida Federal District Court ultimately dismissed the action upon the doctrine of *forum non conveniens*, giving full consideration to all of the public and private interest factors listed in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The trial Court stated that "applying these considerations to the case at bar, the Court finds that the considerations overwhelming[ly] weigh in favor of dismissal. The private interests are hampered in that the alleged injuries occurred in Costa Rica. All of the Plaintiffs are Costa Rican. Most of the evidence and witnesses are in Costa Rica and none are in Florida, and compulsory process would not be available to compel production of this evidence or attendance of these witnesses. The cost of obtaining the evidence would be substantial, if possible. The Defendants would not be able to implead third parties."

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[3]While both Respondents were subject to service of process in Florida, that makes them neither Florida citizens nor is that fact venue dispositive. Personal jurisdiction and venue are distinctly different doctrines. *Leroy v. Great Western United Corp.*, *443 U.S. 173, 180 (1973).*

As to the public interest factors, the trial Court noted further that "this case is essentially fifty-eight different lawsuits with different elements of damages, negligence, contributory negligence, etc. It could not help but congest this Court's docket . . . because of the logistics of dealing with fifty-eight different plaintiffs at this distance. It would force the Court to conduct a complex exercise in comparative law and consider a foreign law with which this Court is not familiar and which is in a foreign language. . . . It would require local jurors to hear and decide a dispute that has no connection with this community.[4] The trial Court's order of dismissal was entered on August 25, 1983.

That dismissal was affirmed by the Eleventh Circuit Court of Appeals by opinion dated April 16, 1985.

ARGUMENT—THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Contrary to the contention of Petitioners, Florida's Courts have accepted and embraced the doctrine of *forum non conveniens* and have, in fact, dismissed cases thereunder.[5] Florida's Supreme Court has recently re-enunciated the state's public policy with respect to its admittedly narrower but existent *forum non conveniens* doctrine—

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[4]Petitioners have never refuted the further fact, found by the trial Court, that they have an alternative forum with an adequate remedy available to them.

[5]This is so, notwithstanding the gratuitous and overly broad statement contained in *Alcoa Steamship Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147, 155 n.10 (2nd Cir. 1978).

> this state has a fundamental interest in resolving controversies *involving its citizens.*

Houston v. Caldwell, 359 So.2d 858, 861 (Fla. 1978), *rev'g* 347 So.2d 1041 (Fla.App. 1977). Conversely, the State need not take an interest in resolving controversies involving non-citizens of Florida and arising in other jurisdictions. In those instances, the Florida judge is vested with the very same federal Court *Gilbert/Piper* discretion to dismiss cases improperly instituted in a Florida forum. Florida's Supreme Court, in *Houston, supra*, adopted this *forum non conveniens* rule, first set out in *Adams v. Seaboard Coastline Railroad Co.*, 224 So.2d 797 (Fla.App. 1969), as follows:

> [T]he recognized law of this state [is] that *if a transitory action is filed in a Court of Florida between nonresident parties seeking to litigate a cause of action accruing in a foreign jurisdiction, the trial Court is accorded a sound discretion in determining whether it should retain jurisdiction of the action or dismiss it* without prejudice to the right of the plaintiff to reinstitute the action in a more appropriate and convenient forum. In the exercise of such discretion, the trial Court may consider whether the filing of the action constitutes forum shopping on the part of the plaintiff; whether it constitutes undue harassment of defendant . . . ; and, whether the convenience of the parties and witnesses, in the interest of justice, requires the action be litigated in a different forum. In the ultimate, however, it is seen that the application of the doctrine of *forum non*

> *conveniens* is restricted to the limited category of cases in which both parties to the action are nonresidents and the cause of action sued upon arose in a jurisdiction outside of Florida. It is only after these two factors emerge and coalesce that the trial Court is authorized to proceed to a determination of whether the criteria necessary to bring into play the doctrine of *forum non conveniens* have been met.

Accord, Seaboard Coastline Railroad Co. v. Swain, 362 So.2d 17 (Fla. 1978).

Florida Courts have historically recognized not only the compelling need to protect its "citizens," be they plaintiffs or defendants, through the Florida Court system, but equally to decline in its discretion access to its Courts by noncitizens in cases involving non-Florida issues arising outside of Florida. The Florida Supreme Court, in *Hagen v. Viney*, 124 Fla. 747, 169 So.391 (Fla. 1936) first stated this as follows:

> It is settled law that Courts of one state are not required to assume jurisdiction of causes between nonresidents arising in other jurisdictions. . . . After all is said, the question of jurisdiction in transitory actions between nonresidents is one of discretion on the part of the Court assuming it. . . .

While it is true that "a long line of Florida cases . . . restrict the application of doctrine of *forum non conveniens* to cases in which neither party to the action is a resident of Florida and in which the causes of action arose outside of Florida," *Sempe v. Coordinated*

Caribbean Transport, Inc., 363 So.2d 194, 197 (Fla.App. 1978), these Petitioners' case falls squarely within Florida's rule allowing dismissal. Petitioners' action is one between non-citizens of Florida arising outside of Florida, in fact outside of the United States. *See also, Killingsworth v. Montgomery Ward & Co.*, 327 So.2d 50 (Fla.App. 1976).

The doctrine of *forum non conveniens* is therefore not unknown in Florida; it is a well entrenched part of Florida's venue rules. The following cases are clear examples of its application by Florida Courts: *Southern Railway Co. v. McCubbins*, 196 So.2d 512 (Fla.App. 1967); *Faulkner v. S.A. Empresa de Viaco Airea Rio Grand*, 222 So.2d 805 (Fla.App. 1969); *Meily v. Agricultural Investment Corp., S.A.*, 276 So.2d 161, (Fla. 1973); *Autry v. Seaboard Coastline R.R. Co.*, 32 Fla.Supp. 53 (Cir.Ct. 1968); *Hubbard v. Southern Railway Co.*, 14 Fla.Supp. 10 (Cir.Ct. 1959); *Baker v. Atlantic Coastline Railroad Co.*, 21 Fla.Supp. 21 (Cir.Ct. 1963). *See also, Underwood, v. University of Kentucky*, 390 So.2d 433 (Fla.App. 1980) (affirming lack of personal jurisdiction dismissal, but stating it would so affirm on *forum non conveniens* grounds as well), and *Southern Railway Co. v. Bowling*, 129 So.2d 433 (Fla.App. 1961) (recognizing applicability of the private and public factors set out in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) but holding that it was not an "abuse of discretion" for the trial Court to refuse to exercise its authority to dismiss an action under the doctrine of *forum non conveniens*). *And see, Ganem v. de Issa*, 225 So.2d 564 (Fla.App. 1969).

In *Southern Railway Co. v. McCubbins, supra*, neither of the parties were citizens of the State of Florida and the claim arose in Tennessee. The plaintiff, resided in

Tennessee; the defendant Railway Company "was a Virginia corporation [and] its principal place of business was not in Florida." Even though the court recognized that the Railway Company had an office and agent in Dade County, Florida and operated its trains in Florida north of Jacksonville, the Court nonetheless dismissed the action upon *forum non conveniens* grounds, citing and relying upon this Court's decision, *Gulf Oil Corp. v. Gilbert, supra*, and holding, in sum, that "it would be difficult to visualize the making of a stronger case for a dismissal under the doctrine."

The same fact pattern is present in *Faulkner, supra*. There the tort action arose out of an accident in Peru. The plaintiffs were not citizens of Florida nor of the United States. The defendants were Varig Airways and the Boeing Company. The case was dismissed upon the doctrine of *forum non conveniens;* the dismissal was affirmed upon the authority of *Southern Railway Co. v. McCubbins, supra*, and upon the principles set out by this Court in *Gulf Oil Corp. v. Gilbert, supra*.

The same result occurred again, in *Meily, supra*, where the plaintiff was a citizen of London, England, and the defendants were a Panamanian corporation and Luxembourg corporation. As in *Faulkner* and in *McCubbins*, the cause of action arose outside the State of Florida.

The *Gulf Oil Corp. v. Gilbert, supra*, factors, dictating *forum non conveniens* dismissal, appear again in the published trial Court decisions, *Autry, Baker*, and *Hubbard, supra*, all *forum non conveniens* dismissals. In *Baker*, for example, the plaintiff was a citizen and resident of North Carolina. The defendant railroad was

a Virginia corporation, which did business in the State of Florida. Adopting, again, this Court's standards set out in *Gulf Oil Corp. v. Gilbert, supra*, the Florida trial Court declined to exercise its jurisdiction upon the doctrine of *forum non conveniens*.[6]

The three Florida cases cited by Petitioners in support of their bald statement that "the law of the State of Florida precludes a *forum non conveniens* dismissal of this action" are factually inapposite (see Petitioners' Brief, p. 6). In all three, *Houston v. Caldwell*, 359 So.2d 858 (Fla. 1978); *Seaboard Coastline R. v. Swain*, 362 So.2d 17 (Fla. 1978); and *Waite v. Summit Leasing & Capital International Corp.*, 441 So.2d 185 (Fla.App. 1983), at least one of the parties was in fact a Florida resident and citizen. This is likewise true of *Shaw v. Seaboard Coast Line Ry*, 229 So.2d 275 (Fla.App. 1969). There, dismissal was denied because the defendant railroad was a Virginia corporation, but because its principal place of business was in Florida.

That is not so in this instance, however. Here no party is a Florida citizen; no party has its principal place of business in Florida.

There may well be a case, perhaps arising out of Florida, in which the *Erie* issue upon which this Court

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[6]See also, *Underwood v. University of Kentucky, supra*, a libel action. In *Underwood*, the appellate Court affirmed dismissal for lack of personal jurisdiction, but commented that

> [even] if we were to rule that jurisdiction may lie in the courts of this state, we would be nonetheless obliged under the circumstances to dismiss on the basis of forum non conveniens.

has reserved could be met and resolved once and for all, assuming this Court's attentions should be accorded to a narrow Florida-peculiar question. This, however, is not the case.

It is plainly dispositive of this Petition that Florida's *forum non conveniens* doctrine, like the federal doctrine, authorizes discretionary dismissal upon the balancing of the relative convenience of the litigants and the forum upon facts such as are here present. The Eleventh Circuit neither erred in upholding application of the federal principals of *forum non conveniens* (since the state principals would be the same in this instance) nor did it permit the so-called "accident of diversity of citizenship" to constitute the deciding factor in this action. The Eleventh Circuit, and the trial Court, did not "defy" *Erie*. There is and was no "chasm" existing between the Federal and Florida doctrine in this particular instance and no amount of rhetoric by Petitioners can change this.

Furthermore, even assuming *arguendo* that the Florida rule would in this case work a different result, *Erie* does not dictate that the Florida rule be considered because *forum non conveniens* is a matter of procedure, not of substance. This Court has already labeled it as such in *Missouri ex rel. Southern Ry Co. v. Mayfield*, 340 U.S. 1, 3 (1950):

> According to its own notions of *procedural policy*, a State may reject, as it may accept, the doctrine [of *forum non conveniens*] for all causes of action begun in its courts.

To bolster their position, however, Petitioners argue that the law respecting personal jurisdiction and service of process is the law which applies to venue matters. Respondent does not dispute that a "Federal District Court sitting in diversity has *personal jurisdiction* over the defendant to the extent permitted by state law" and does not dispute that it was subject to service of process in Florida. Respondent does however dispute the Petitioners' effort to cloud two different and distinct doctrines by persistent reference to state service of process cases and rules. As explained in *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979), this is inaccurate. "The question of personal jurisdiction, which goes to the Court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *See also, PI, Inc. v. Valcoun Imprinted Papers, Inc.*, 465 F.Supp. 1218 (S.D.N.Y. 1979) and Moore, *1 Moore's Federal Practice*, 90.140 [1.-2]:

> [Federal] jurisdiction of the subject matter relates to the power of the court to hear and determine the matter in litigation. In personam, in rem, and quasi in rem jurisdiction relate to the court's power over the person or property of the defendant. Venue, on the other hand, relates to the locality of a lawsuit, the forum where judicial power may be set in motion, but it does not limit the jurisdiction of the court. . . . Another relationship is that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by statute and the selected forum is proper under venue statutes. Such resistance is recognized by the doctrine of *forum non conveniens*, a facet of

venue, and §1404(a) of the Code, which provides generally for transfer rather than dismissal.

This leaves Petitioners' final argument: application of the "outcome determinative" test.

In this regard, Petitioners concentrate on the Erie statements made by this Court in *Guaranty Trust Company v. York*, 326 U.S. 99 (1945) and *Hanna v. Plumer*, 380 U.S. 460 (1965) ignoring one other *Erie*-relevant decision, *Byrd v. Blue Ridge Rural Electric Cooperative*, 365 U.S. 525 (1958).

Byrd recognizes the broad *Erie* policy of adopting state rules in diversity cases when those rules "bear substantially on the question of whether the litigation would come out one way in the federal court and another way in the state court." But, *Byrd* recognizes also that "outcome" is not the only consideration.

> [There] are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. . . . The policy of uniform enforcement of state-created rights and obligations, see, e.g., Guaranty Trust Company of New York v. York, supra, cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury [citation omitted]. Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that

the litigation should not come out one way in the federal court and another way in the state court.

In *Byrd*, a diversity case, this Court rejected application of South Carolina's rule that the defense of immunity from suit under the workers' compensation laws was one to be decided by a judge rather than a jury. This Court reiterated that "state laws cannot alter the essential character or function of a federal court" because that function is not in any sense a local matter and "state statutes which would interfere with appropriate performance of that function are not binding upon the federal court under either the Conformity Act or the 'Rules of Decision' Act." *See also Simler v. Conner*, 372 U.S. 221, 222 (1963) ("the right to a jury trial in federal courts is to be determined as a matter of federal law in diversity as well as other actions"); and *Donovan v. Penn Shipping Company, Inc.*, 429 U.S. 648, 649-650 (1977) (in the federal system "reviewing the size of jury verdicts is, however, a matter of federal law" and a plaintiff cannot protest a remittitur he accepted in order to open it to challenge on appeal).[7]

[7]The facts of this case make it inappropriate for consideration of the reserved *Erie forum non conveniens* question and this case – on its facts – presents no important question of federal law. It is nonetheless believed that a federal court in a diversity case is governed by federal law on this issue and that this Court, given the appropriate case, will so hold. *See Murphee v. Mississippi Publishing Corporation*, 149 F.2d 138, 140 (5th Cir. 1945); *Brown v. Pyle*, 310 F.2d 95, 97 (5th Cir. 1962); *Miller v. Davis*, 507 F.2d 308 (6th Cir. 1974); *Cochrane v. Iowa Beef Processors*, 596 F.2d 254, 260 (8th Cir. 1979); In *Re Richardson-Merrill, Inc.*, 545 F.Supp. 1130, 1132 (S.D. Ohio 1982), *aff'd* 727 F.2d 608 (6th Cir. 1984); *Hodson v. A.H. Robins Company, Inc.*, 528 F.Supp. 809, 817 (E.D. Va. 1981).

The "outcome determinative" argument fails too, therefore, not only because "outcome determination" is not the last word when it comes to disruption of the federal system but also because this case would have been dismissed by a Florida court not only under its *forum non conveniens* principles but for yet another reason.

Assuming *arguendo* that *forum non conveniens* is a matter of substance, and not a matter of procedural "housekeeping,"[8] then being substantive, Florida's choice of law rules would come into play. A Florida court would be required to apply the substantive law of the jurisdiction with the most signficant contacts to this claim, which would be the law of Costa Rica. See *Klaxton v. Stentor Electric Company, Inc.*, 313 U.S. 487 (1941); *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975); *Bishop v. Florida Special Paint Company*, 389 So.2d 999 (Fla. 1980). In *Bishop, supra*, the Florida Supreme Court adopted the "signficant relationships test" as set forth in the Restatement (Second) of Conflict of Laws §§145-146 (1971) as applicable to tort actions arising in other jurisdictions. Under this rule, "the state where the injury occurred would, under most circumstances, be the decisive consideration indetermining the applicable choice of law." *Bishop, supra, at 1001*

Petitioners here argue that the Florida *forum non conveniens* rule is substantive for *Erie* purposes, but are forced to argue, further, that the same *forum non conveniens* rule is procedural for choice of law purposes, because if it is not a procedural rule of Florida then Costa Rican venue and *forum non conveniens* principles

[8] *Hanna v. Plumer*, 380 U.S. 460, 473 (1965).

will apply in the Florida court. And Costa Rican law would dictate dismissal, because the jurisdiction of Costa Rican Courts is strictly territorial; their Courts entertain no tort actions arising extra-territorially. *Civil Code of Costa Rica*, Articles 6 and 1045-1048; *Labor Code of Costa Rica*, Articles 210-212; and Code of *Civil Procedures of Costa Rica*, Articles 1-7. In sum, therefore, accepting Petitioners' view *in toto*, the *real Erie* issue if any exists is not would the outcome have been different with the application of Florida venue rules but rather would it have been different with the application of Costa Rican venue rules, adopted in Florida under its conflict of laws/choice of law rules. Petitioners want but cannot have it both ways. The alleged "accident of diversity" interferes in no fashion with this proceeding.

CONCLUSION

"A review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reason therefor." Sup.Ct.R.17. Even given the *Erie* question as yet reserved by this Court in *Gulf Oil Corp. v. Gilbert, supra*, this is not the case for resolution of that issue. Applying state or federal (or Costa Rican) principles yields the same result. If there was any forum shopping, it was on the part of these Costa Rican plaintiffs and their Texas lawyers who sought out Florida for this plainly non-Florida lawsuit.

The decision of the Eleventh Circuit was fully consistent with established legal principles. Review is unwarranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been mailed by deposit with the United States post office, first-class postage prepaid on this 16th day of October, 1985, to the following persons:

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